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No. 05-83

IN THE

Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

vs.

ARTURO R. RECUENCO,

Respondent.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1) Is *Blakely* v. *Washington* subject to harmless error analysis?

2) Should the full retroactivity rule of *Griffith* v. *Kentucky* be modified?

TABLE OF CONTENTS

Questions presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 4

Argument 5

I

Blakely error is subject to harmless error analysis under *Neder* 5

II

Applying harmless error to *Blakely* will mitigate the cost of the *Griffith* full retroactivity rule 14

III

The full retroactivity rule of *Griffith* v. *Kentucky* should be limited to cases of actual prejudice 17

A. Retroactivity 18

B. Prejudice 21

Conclusion 23

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey, 530 U. S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) 3, 6, 7, 14, 20

Arizona v. Fulminante, 499 U. S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) 5

Batson v. Kentucky, 476 U. S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) 18

Blakely v. Washington, 542 U. S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) 1, 3, 5, 6, 8, 14

Brecht v. Abrahamson, 507 U. S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) 16, 21

Carella v. California, 491 U. S. 263, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) 9, 10

Caspari v. Bohlen, 510 U. S. 383, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994) 23

Chapman v. California, 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) 16, 17, 21

Daniel v. Louisiana, 420 U. S. 31, 95 S. Ct. 704, 42 L. Ed. 2d 790 (1975) 18

Desist v. United States, 394 U. S. 244, 89 S. Ct. 1030, 22 L. Ed. 2d 248 (1969) 18, 19

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Dorsey v. State, 278 Md. 221, 362 A. 2d 642 (1976) 8

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Gideon v. Wainwright, 372 U. S. 335, 83 S. Ct. 792,
9 L. Ed. 2d 799 (1963) 6, 14

Griffith v. Kentucky, 479 U. S. 314, 107 S. Ct. 708,
93 L. Ed. 2d 649 (1987) 15, 17, 18, 19

In re Winship, 397 U. S. 358, 90 S. Ct. 1068,
25 L. Ed. 2d 368 (1970) 6, 12

Johnson v. New Jersey, 384 U. S. 719, 86 S. Ct. 1772,
16 L. Ed. 2d 882 (1966) 15, 19

Johnson v. United States, 520 U. S. 461, 117 S. Ct. 1544,
137 L. Ed. 2d 718 (1997) 5, 8, 9, 22

Linkletter v. Walker, 381 U. S. 618, 85 S. Ct. 1731,
14 L. Ed. 2d 601 (1965) 15

Mackey v. United States, 401 U. S. 667, 91 S. Ct. 1160,
28 L. Ed. 2d 404 (1971) 15, 18, 19, 20

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6 L. Ed. 2d 1081 (1961) 15

McKaskle v. Wiggins, 465 U. S. 168, 104 S. Ct. 944,
79 L. Ed. 2d 122 (1984) 6

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16 L. Ed. 2d 694 (1966) 15

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44 L. Ed. 2d 508 (1975) 6, 7, 8

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144 L. Ed. 2d 35 (1999) 8-13

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106 L. Ed. 2d 256 (1989) 19

Pope v. Illinois, 481 U. S. 497, 107 S. Ct. 1918,
95 L. Ed. 2d 439 (1987) 9, 10

Ring v. Arizona, 536 U. S. 584, 122 S. Ct. 2428,
153 L. Ed. 2d 556 (2002) 20, 23

Rose v. Clark, 478 U. S. 570, 106 S. Ct. 3101,
92 L. Ed. 2d 460 (1986) 5, 8, 13

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61 L. Ed. 2d 39 (1979) 8, 10, 13

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159 L. Ed. 2d 442 (2004) 18, 20

Shea v. Louisiana, 470 U. S. 51, 105 S. Ct. 1065,
84 L. Ed. 2d 38 (1985) 20

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110 P. 3d 188 (2005) 2, 3

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18 L. Ed. 2d 1199 (1967) 17

Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 2052,
80 L. Ed. 2d 674 (1984) 21, 23

Sullivan v. Louisiana, 508 U. S. 275, 113 S. Ct. 2078,
124 L. Ed. 2d 182 (1993) 9

Teague v. Lane, 489 U. S. 288, 109 S. Ct. 1060,
103 L. Ed. 2d 334 (1989) 17, 19

Tumey v. Ohio, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749
(1927) 6

Tweety v. Mitchell, 682 F. 2d 461 (CA4 1982) 8

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160 L. Ed. 2d 621 (2005) 14

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88 L. Ed. 2d 598 (1986) 6

Waller v. Georgia, 467 U. S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) 6

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case addresses the potential impact of *Blakely* v. *Washington*, 542 U. S. 296 (2004) on the criminal justice system. *Blakely* is already one of the most disruptive decisions ever to come from this Court, potentially threatening tens of

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

thousands of sentences. Allowing its rule to be ameliorated by harmless error analysis will save many sentences at no appreciable cost to the integrity of the *Blakely* rule. A decision upholding these otherwise valid sentences is consistent with the interests of public safety and justice which the CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The defendant, Arturo Recuenco, had become angry with his wife for not cooking for his relatives, so he smashed their stove, and threatened her with a gun. See *State* v. *Recuenco*, 154 Wn. 2d 156, 159, 110 P. 3d 188, 189 (2005). He was charged with second-degree assault, with a deadly weapon enhancement for using the gun. See *id.*, at 158, 110 P. 3d, at 189. Recuenco was also charged with interfering with domestic violence reporting and third-degree malicious mischief. *Id.*, at 159, 110 P. 3d, at 189.

The trial court gave the jury a special verdict form which asked " 'was the defendant ARTURO R. RECUENCO armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree?' " *Ibid.* The prosecutor had never asked for a special verdict form, but the defense "proposed an identical one," to what the court submitted. See *id.*, at 159, 110 P. 3d, at 189-190.

A jury convicted Recuenco on all three charges and returned a verdict that he had been armed with a deadly weapon. *Id.*, at 160, 110 P. 3d, at 190. "The jury was not asked to, and therefore did not, return a special verdict that Recuenco committed the assault while armed with a firearm." *Ibid.* The base sentence for the assault count was three to nine months. See *ibid.* The deadly weapon enhancement would add a year to the base sentence while a firearm enhancement would add three years. See *ibid.* The prosecution asked for a three-month base term and a three-year enhancement for firearm use, but the defense objected to the enhancement, asserting that it had to be

pled and proven to a jury. See *ibid.* The trial court imposed the 39-month term requested by the prosecution, "reasoning that it had 'no discretion but to impose the statutorily mandated term with regard to the deadly weapon enhancement.' " *Ibid.* The sentences for the other counts were suspended. See *ibid.*

Recuenco appealed his conviction and sentence. One of his claims was that the enhancement violated due process because it was imposed without notice or a reasonable doubt finding by a jury. See *id.*, at 160-161, 110 P. 3d, at 190. The state intermediate appellate court affirmed Recuenco's conviction and sentence, finding that even if the enhancement violated *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), the error was harmless.[2] See *Recuenco*, *supra*, at 161, 110 P. 3d, at 190. After the initial appeal, *Blakely* v. *Washington*, 542 U. S. 296 (2004) was decided and subsequently the Washington Supreme Court granted review to determine the *Apprendi/Blakely* issue. See *Recuenco*, *supra*, at 161, 110 P. 3d, at 190. The Washington Supreme Court found *Blakely* error, and also held that *Blakely* error could never be harmless as it involved a violation of the defendant's right to a jury trial, based on its decision the same day in another case. See *id.*, at 164, 110 P. 3d, at 192 (citing *State* v. *Hughes*, 154 Wn. 2d 118, 110 P. 3d 192 (2005)).

This Court granted certiorari on October 17, 2005.

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2. The intermediate court also indicated that the error " 'appeared' " to be invited because the defense "proposed the special verdict form the [trial] court used asking the jury only to find the existence of a deadly weapon, not specifically a firearm." *Id.*, at 163, 110 P. 3d, at 191. The Washington Supreme Court rejected the People's invited error claim, holding that there was no invited error because the defense was only asserting what it believed to be the correct instruction for second-degree assault with a deadly weapon enhancement and that the defendant consistently objected to the trial court's imposition of the firearms enhancement. See *id.*, at 163-164, 110 P. 3d, at 191-192.

SUMMARY OF ARGUMENT

Whether error under *Blakely* v. *Washington* is subject to harmless error analysis is governed by examining *Neder* v. *United States*. *Neder* held that an instruction which allowed the judge rather than the jury to determine an element of the crime was susceptible to harmless error analysis. *Blakely* treats certain sentence enhancements like an element of the crime, making *Blakely* error no different than the type of error that *Neder* determined could be harmless. In light of *Neder*, *Sullivan* v. *Louisiana* cannot support a finding of structural error in this case.

This conclusion is consistent with the nature of *Blakely* and harmless error. Harmless error is the rule, and structural error is the exception, reserved for those errors that are *per se* prejudicial or which do not have any adverse effect on the trial. *Blakely* does not fit either category of structural error. *Blakely* is an extension of due process cases including *Mullaney* v. *Wilbur* and *Sandstrom* v. *Montana*, which are susceptible to harmless error analysis.

Applying harmless error to *Blakely* will mitigate the cost of full retroactivity under *Griffith* v. *Kentucky*. *Blakely* has caused unprecedented disruption of the criminal justice system. Most of the prior landmark criminal procedure cases were not applied retroactively on direct review. Retroactive application will make *Blakely* even more disruptive than cases like *Miranda* v. *Arizona* or *Mapp* v. *Ohio*. Jurisprudential concerns are a valid consideration in harmless error analysis, and *Blakely*'s disruptiveness is a reason to temper that decision with harmless error.

The full retroactivity rule of *Griffith* should be limited to cases of actual prejudice. *Griffith* was adopted to promote judicial integrity and to treat similarly situated defendants equally. This comes with an enormous penalty, an equal harshness to the victims of the guilty criminals who benefit from *Griffith*. Justice Harlan's writings, the basis for *Griffith*, recognize that the proper scope of retroactivity is limited by the

scope of necessity for the rule. Requiring prejudice for retroactivity will preserve the equal treatment of defendants where it is most useful, while minimizing *Griffith*'s considerable harm to the interests of victims and society. It would also treat defendants more equally, as currently only those with counsel prescient enough to anticipate the new rule will receive its full benefits. A prejudice requirement will not burden the courts, but will make cases more dependent upon their merits rather than counsel's anticipation of changes in the law.

ARGUMENT

I. *Blakely* error is subject to harmless error analysis under *Neder*.

This case addresses the extent of the disruption to the criminal justice system caused by *Blakely* v. *Washington*, 542 U. S. 296 (2004). *Blakely*, often described as creating a revolution in sentencing, see Mnookin, Uncertain Bargains: The Rise of Plea Bargaining in America, 57 Stan. L. Rev. 1721, 1736, n. 21 (2005), is having a profound impact on the administration of justice. Applying the harmless error doctrine to *Blakely* will ameliorate some of its more revolutionary consequences, while preserving the *Blakely* rule for genuine miscarriages of justice.

This case begins with a presumption that the error can be harmless. "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose* v. *Clark*, 478 U. S. 570, 579 (1986). The availability of harmless error is the norm for most constitutional criminal procedure. Indeed, "most constitutional errors can be harmless." *Arizona* v. *Fulminante*, 499 U. S. 279, 306 (1991). "Structural" errors, which are not subject to harmless error analysis, are found "only in a very limited class of cases." *Johnson* v. *United States*, 520 U. S. 461, 468 (1997). This limited class of error typically involves error that fatally

compromises the entirety of the trial, see *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (complete denial of counsel); *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (biased trial judge) or where the error's effect on the outcome of the trial cannot be readily identified. See *Vasquez* v. *Hillery*, 474 U. S. 254 (1986) (racial discrimination in grand jury selection); *McKaskle* v. *Wiggins*, 465 U. S. 168 (1984) (denial of self-representation at trial); *Waller* v. *Georgia*, 467 U. S. 39 (1984) (no public trial). In both types, harmless error review would be unreasonable. Harmless error analysis is pointless when the type of error necessarily compromises the trial's fairness, as this type of error is so prejudicial it will never be harmless. The other structural errors, such as grand jury discrimination or the denial of self-representation, do not prejudice the defendant's chance to avoid a guilty verdict but instead violate another societal interest. In these cases, the error would always be harmless if subjected to an impact-on-the-trial test, effectively subverting the rule and compromising the other societal interest.

Blakely does not fit either form of structural error. *Blakely*, an application of *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), requires the government to treat factors used to increase the sentence beyond the statutory maximum as an element of the crime to be proved beyond a reasonable doubt before the jury. See *Blakely*, 542 U. S., at 301. That decision centers on the state's authority to reclassify elements of the crime as sentencing factors. See *id.*, at 302, n. 6. In essence, *Blakely* and *Apprendi* are heirs of the idea that the state cannot manipulate the codes to avoid the due process requirement that every element must be proven beyond a reasonable doubt.

This principle was most prominently expressed in *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975). *Mullaney* dealt with a Maine law requiring the defendant to prove that he acted " 'in the heat of passion on sudden provocation' " to reduce murder to manslaughter. See *id.*, at 684-685. In holding that this violated the due process guarantee of *In re Winship*, 397 U. S. 358 (1970), this Court relied on the threat to the reasonable doubt

requirement posed by the manipulation of the definition of crimes.

> "Moreover, if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of the punishment." *Mullaney*, *supra*, at 698.

Apprendi and *Blakely* address similar concerns. *Mullaney* demonstrated that *Winship*'s reasonable doubt requirement applied not only to the question of guilt or innocence, but to the consequences of a guilty verdict, see *Apprendi*, 530 U. S., at 485, which is an important link in the logical chain between *Winship* and *Apprendi*. *Apprendi* turns on the same principle found in *Mullaney*, that a state cannot avoid reasonable doubt or a jury trial by reclassifying an element of a crime as a factor that influences the consequences of a conviction. If a factor other than a prior conviction is to be used to increase the sentence from the statutory maximum, then it must be submitted and proven to the jury just like any other element of a crime. See *Apprendi*, 530 U. S., at 490.

The *Blakely* Court stresses that a sentencing factor which enhances the sentence beyond the statutory maximum is the same as an element of the crime.

> "Those who would reject *Apprendi* are resigned to one of two alternatives. The first is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and those it labels sentencing factors—no matter how much they may increase the punishment—may be found by the judge. This would mean that a judge could sentence a man for committing murder even if the jury only convicted him of illegally possessing a firearm used to

commit it—or of making an illegal lane change while fleeing the scene." 542 U. S., at 306.

Errors of this sort are subject to harmless error analysis. While the error in *Mullaney* was so clearly prejudicial that harmless error analysis was out of the question in that particular case, see 421 U. S., at 705 (Rehnquist, J., concurring), the better view is that *Mullaney* error can be harmless under the right circumstances. See *Tweety* v. *Mitchell*, 682 F. 2d 461, 465 (CA4 1982); *Dorsey* v. *State*, 278 Md. 221, 224-225, 362 A. 2d 642, 645 (1976). The closely related rule of *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), is also subject to harmless error analysis. See *Rose*, 478 U. S., at 579-580. Errors which "alter the terms under which the jury considered the defendant's guilt or innocence," can still be harmless. *Id.*, at 582, n. 11. What matters is whether *Blakely* error is the type of error that is simply incompatible with harmless error analysis, like *Hillery* or *McKaskle*, or is it, like *Gideon*, one of those "errors [that] deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determining guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.' " *Neder* v. *United States*, 527 U. S. 1, 8-9 (1999) (quoting *Rose*, *supra*, at 577-578).

Blakely error deprives the defendant of having the jury find beyond a reasonable doubt every element of the crime. Under *Neder*, "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair . . . ." 527 U. S., at 9 (emphasis in original). The *Neder* Court relied on earlier examples of missing or improper instructions on elements being held harmless. See *id.*, at 9-10. A perjury conviction was not reversed for "plain error" in a case where the judge rather than the jury found materiality when the evidence was "overwhelming" and "[m]ateriality was essentially uncontroverted . . . ." See *Johnson* v. *United States*, 520 U. S. 461, 470 (1997). In the context of such overwhelming evidence, the error did not " 'seriously affect[] the fairness,

integrity, or public reputation of judicial proceedings.' " *Id.*, at 469 (quoting *United States* v. *Olano*, 507 U. S. 725, 736 (1993)). Harmless error was also applied in several cases involving improper instruction on one element of the offense. See *Neder*, *supra*, at 9-10; *Yates* v. *Evatt*, 500 U. S. 391, 402-403 (1991); *Carella* v. *California*, 491 U. S. 263, 266-267 (1989) (*per curiam*); *Pope* v. *Illinois*, 481 U. S. 497, 501-502 (1987).

The obstacle to *Neder*'s holding was *Sullivan* v. *Louisiana*, 508 U. S. 275 (1993), which held that a defective reasonable doubt instruction was not amenable to harmless error analysis. The *Sullivan* Court provided two rationales for its decision that the improper reasonable doubt instruction could not be harmless. One was that an improper reasonable doubt instruction cannot be harmless because it "vitiates *all* the jury's findings," *id.*, at 281 (emphasis in original), which produces "consequences that are necessarily unquantifiable and indeterminate . . . ." *Id.*, at 282. This holding was compatible with a finding that a failure to instruct on a particular element was harmless, since that error did not vitiate all of the jury's findings. See *Neder*, 527 U. S., at 11. But the *Neder* decision also had to address *Sullivan*'s other rationale, that "harmless-error analysis cannot be applied to a constitutional error that precludes the jury from rendering a verdict of guilty-beyond-a-reasonable-doubt because 'the entire premise of *Chapman* review is simply absent.' " *Ibid.* (quoting *Sullivan*, *supra*, at 280). Harmless error is improper in this circumstance, according to *Sullivan* because the error's effect cannot be measured. As the *Sullivan* Court explained, if there is no verdict of guilty-beyond-a-reasonable-doubt then "the question whether the *same* verdict of guilty beyond a reasonable doubt would have been rendered is utterly meaningless. There is no *object*, so to speak, upon which the harmless-error scrutiny can operate." *Sullivan*, *supra*, at 280 (emphasis in original). Since the failure to instruct on an element prevents the jury from considering each element of the crime, Neder argued that *Sullivan*'s second principle applied with equal force to his case, making harmless

error analysis improper. See 527 U. S., at 11. While *Neder* was consistent with *Sullivan*'s result, it was not consistent with "the entire reasoning" of *Sullivan*. *Id.*, at 10. *Sullivan*'s more restrictive view of harmless error was disapproved.

Although the *Neder* Court found some merit to this argument in the abstract, *Sullivan*'s second rationale could not apply because it was inconsistent with a substantial body of harmless error precedent. See *id.*, at 10-11. In more than one case, an improper jury instruction on an element was susceptible to harmless error analysis. See *id.*, at 11-12. Indeed, "the absence of a 'complete verdict' on every element of the offense establishes no more than that an improper instruction on an element of the offense violates the Sixth Amendment's jury trial guarantee." *Id.*, at 12. Whether that error can be harmless was a question that was decided by following these other harmless error precedents. See *id.*, at 12-13.

Carella addressed a California statute presuming embezzlement from a failure to return a rental car within five days of the agreed date and a statute presuming an intent to commit fraud from failing to return property within 20 days of a written demand of the owner after the lease has expired. See 491 U. S., at 264. "These mandatory directions directly foreclosed independent jury consideration of whether the facts proved certain elements of the offenses with which Carella was charged. The instructions also relieved the State of its burden of . . . proving every element of Carella's crime beyond a reasonable doubt," which was subject to harmless error analysis. See *id.*, at 266. In *Pope*, an obscenity case, the jury was unconstitutionally instructed to apply community standards to the work's value. See 481 U. S., at 500. Once again, this was still subject to harmless error analysis, even though the work's value was an element of the offense. See *id.*, at 499, n. 1, 503-504. Similarly, in *Yates*, two mandatory rebuttable presumptions, which violated *Sandstrom*, *supra*, and *Francis* v. *Franklin*, 471 U. S. 307 (1985), see 500 U. S., at 401, were subject to harmless error review. See *id.*, at 402-403.

While there could be some logic to extending *Sullivan* to a failure to instruct on an element, these cases foreclosed that result. See *Neder*, 527 U. S., at 15. Given the overwhelming evidence of the missing element in Neder's case, there was no reason to depart from precedent. See *ibid.*

While *Sullivan* was a unanimous opinion, *Neder* drew a vigorous dissent from three Justices. Justice Scalia's dissent centered on the right to jury trial. By withholding an element of the crime from the jury, the trial court in *Neder* prevented the jury from ever considering that element. See 527 U. S., at 31 (Scalia, J., dissenting). According to the dissent, allowing an appellate court to find this error harmless repeats the trial court's error of allowing a judge rather than a jury to find an element of the charged crime, see *id.*, at 32, which the dissent characterizes as an appellate court directing a verdict of guilt in a criminal case. See *id.*, at 33.

The dissent addresses the authority cited by the *Neder* majority in two ways. *Johnson* is distinguished because the defendant in *Johnson* never requested a materiality instruction. See *Neder*, 527 U. S., at 34. This makes *Johnson* more a matter of waiver to the dissent where the failure to object to the deprivation of the right to jury trial "will preclude automatic reversal." *Id.*, at 35. *Carella*, and other cases, are explained by the dissent as an unusual type of harmless error analysis. The dissent recognized that the structural error doctrine did not prevent harmless error findings with respect to the jury trial right, but that it is a "peculiar sort" of harmless error analysis, "looking not to whether the jury's verdict would have been the *same* without the error, but rather to whether the error did not *prevent* the jury's verdict." *Ibid.* (emphasis in original). *Carella*, *Pope*, and *Roy* were cases where "the facts *necessarily found* by the jury (and not those merely discerned by the appellate court) support the existence of the element omitted or misdescribed in the instruction . . . ." *Id.*, at 35 (emphasis in original). The majority's disapproval of *Sullivan*, and allowing harmless error analysis whenever an element is missing, went

too far for the dissent, allowing what it saw as the appellate court usurping the jury's function.

The dissent rests on what it sees as the sanctity of the verdict. Many constitutional errors can influence the verdict. Harmless error is permissible, "only when the jury *actually renders* a verdict—that is when it has found the defendant guilty of all the elements of a crime." 527 U. S., at 38. This analysis begs the question of why should right-to-jury errors merit such extraordinary treatment. By concentrating so closely upon the jury trial guarantee, the dissent loses sight of the general context of harmless error analysis.

As noted earlier, harmless error is the rule, and structural error is the exception. See *supra*, at 5. For an error to be exempt from harmless error analysis, there must be some substantial justification that separates it from the norm. While important to a fair trial, that fact alone does not exempt the jury trial error found in *Neder* or the present case from harmless error analysis. While ranking the importance of constitutional guarantees is uncertain at best, it is difficult to see how the reasonable doubt requirement is any less important than the jury trial guarantee. *In re Winship*, 397 U. S. 358, 363 (1970) (a criminal trial without a reasonable doubt requirement lacks fundamental fairness); see also *id.*, at 362-363 (reasonable doubt recognized as constitutionally required). Yet, as *Sandstrom* demonstrates, violations of the reasonable doubt requirement can be harmless.

The *Neder* dissent's efforts to distinguish failure to instruct on an element from other errors that influence the jury's verdict do not succeed. As the majority notes, other errors, like violations of the self-incrimination privilege or the right to confront witnesses, "infringe upon the jury's factfinding role and affect the jury's deliberative process in ways that are strictly speaking not readily calculable," but are still amenable to harmless error analysis. 527 U. S., at 18. An even better example is found in the *Sandstrom* line of cases. A mandatory conclusive presumption effectively removes that issue from the

jury's consideration. "Like an omission, a conclusive presumption deters the jury from considering any evidence other than that related to the predicate facts (*e.g.*, an intentional killing), and 'directly foreclose[s] independent jury consideration of whether the facts proved established certain elements of the offens[e]' (*e.g.*, malice)." *Id.*, at 10 (quoting *Carella*, 491 U. S., at 266). The offending instruction in *Sandstrom* was no different. "But, more significantly, even if a jury *could* have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they *did* do." *Sandstrom*, 442 U. S., at 526 (emphasis in original, footnote omitted). This error can also be found harmless. See *Rose*, 478 U. S., at 579-580.

Harmless error analysis cannot remove the taint of error from a conviction. The doctrine is derived from the recognition that while error is often inevitable, it is not inevitably fatal. As in *Neder*, *Blakely* error is not one of the rare types of structural error. It neither hopelessly compromises the trial's fairness like the complete denial of counsel, nor is *Blakely* error the type of error that has no appreciable effect on the outcome of the case, like grand jury discrimination. Unlike grand jury discrimination, or denial of self-representation, harmless error analysis will not fatally compromise *Blakely*. *Blakely* error can prejudice the defendant's trial by lessening the prosecution's burden of proof. Also, as in *Neder*, it withdraws an element from the defendant's chosen factfinder, the jury. These errors can be evaluated for harmlessness.

There is no meaningful difference between *Blakely* error and *Neder*. Since the *Apprendi/Blakely* line requires the courts to treat sentence enhancements as an element of the underlying crime under certain circumstances, *Blakely* error is the same as the error in *Neder*, withdrawing an element of the crime from the jury's consideration. See 527 U. S., at 6. The only difference is that in *Neder* the omitted element could mean the difference between guilt and innocence, while under *Blakely* the error simply influences the maximum possible sentence which

may be meted out to the guilty criminal. As *Mullaney* and *Apprendi* demonstrate, that is a distinction without a difference. Since *Blakely* error does not make the trial fundamentally unfair, and *Neder* demonstrates that the effect of a missing element on the verdict can be measured, *Blakely* error can be harmless.

II. Applying harmless error to *Blakely* will mitigate the cost of the *Griffith* full retroactivity rule.

Blakely v. *Washington*, 542 U. S. 296 (2004) is one of the most important criminal justice decisions to come from this Court. At a Senate Judiciary Committee hearing on *Blakely*, when asked if any case has had as great an impact " 'on the practical working out of justice' as *Blakely*" most experts could only come up with *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). See Bowman, Train Wreck? Or Can the Federal Sentencing System be Saved? A Plea for Rapid Reversal of *Blakely* v. *Washington*, 41 Am. Crim. L. Rev. 217, 251-252 (2004). The immediate aftermath to *Blakely* was as if an earthquake had hit the criminal justice system. See Berman, Punishment and Crime: Reconceptualizing Sentencing, 2005 U. Chi. Legal F. 1, 35-36 (2005). *Blakely* and *United States* v. *Booker*, 543 U. S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) may cause "many jurisdictions . . . . to significantly restructure their sentencing systems . . . ." Berman, *supra*, at 36.

Before *Blakely*, a revolution in sentencing had developed over the last 30 years. The clear trend was away from highly discretionary to much more guided sentencing, with enhancements playing a key role in adjusting the penalty to the particular circumstances of the case. See *Booker*, 125 S. Ct., at 751-752, 160 L. Ed. 2d, at 645. *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), *Blakely*, and *Booker* are this Court's responses to these charges. See *Booker*, 125 S. Ct., at 752, 160 L. Ed. 2d, at 645-646; Berman, *supra*, at 41. Since sentencing is a part of

every criminal conviction, and there had been no indication from this Court before *Apprendi* and *Blakely* that there were constitutional problems with enhancements, this counter-revolution necessarily disrupts the administration of justice. Although not sufficient to change the substance of *Apprendi*, *Booker*, and *Blakely*, the reality of the disruption these cases are causing should influence their administration.

The total retroactivity doctrine of *Griffith* v. *Kentucky*, 479 U. S. 314, 328 (1987) adds to *Blakely*'s burden on the state and, through *Booker*, federal criminal justice systems. *Griffith* retroactivity leaves an extraordinary number of sentences subject to reversal on direct review. The prior rule of limited retroactivity lessened the impact of sudden departures from precedent. One criticism of *Griffith*'s predecessor, *Linkletter* v. *Walker*, 381 U. S. 618 (1965), was that its limited retroactivity rule "cut this Court loose from the force of precedent, allowing us to restructure artificially those expectations legitimately created by extant law and thereby mitigate the practical force of *stare decisis* . . . ." *Mackey* v. *United States*, 401 U. S. 667, 680 (1971) (Harlan, J., concurring and dissenting); see also *Linkletter*, *supra*, at 644 (Black, J., dissenting). This reduces the need to adhere to precedent, making change easier. While this is a reason for the *Griffith* rule, it also shows the very different context between *Blakely* and this Court's landmark decisions of the 1960's. In the absence of *Linkletter*, the landmark *Blakely* decision will have an unprecedented impact on the administration of justice.

Landmark cases like *Mapp* v. *Ohio*, 367 U. S. 643 (1961) and *Miranda* v. *Arizona*, 384 U. S. 436 (1966) were not made retroactive on appeal, see *Linkletter*, 381 U. S., at 640 (*Mapp*); *Johnson* v. *New Jersey*, 384 U. S. 719, 732 (1966) (*Miranda*). Avoiding the disruption of the criminal justice system that would come from full retroactivity on direct review was a substantial consideration in both cases. See *Linkletter*, *supra*, at 637-638; *Johnson*, *supra*, at 731. *Blakely* is without the net of *Linkletter* to mitigate its considerable impact. Whatever

reasons exist for the *Griffith* rule, the fact remains that *Griffith* allows *Blakely* to be more disruptive to existing judgments than either *Mapp* or *Miranda* was. Harmless error can help to alleviate the pressures on the justice system coming from the interplay between *Griffith* and *Blakely*. While the harmless error question cannot be decided by a desire to avoid disruption, it should be influenced by that consideration.

Jurisprudential concerns do inform the harmless error question. The special burdens of federal habeas on finality and comity support a lower standard for harmless error on habeas than on direct review. See *Brecht* v. *Abrahamson*, 507 U. S. 619, 637-638 (1993). *Chapman*'s standard was itself informed by a balance of interests. See *Chapman* v. *California*, 386 U. S. 18, 22-23 (1967). Applying harmless error to *Blakely* is an appropriate response to *Blakely*'s "No. 10 earthquake" on the criminal justice system. See Sandra Day O'Connor, Speech to Annual Conference of Ninth Circuit Court of Appeals (July 22, 2004), quoted in *Blakely* Roils Waters of Federal Sentencing, 36 The Third Branch, No. 8 (Aug. 2004), http://www.uscourts.gov/ttb/august04ttb/blakely/; Bowman, The Failure of the Federal Sentencing Guidelines, 105 Colum. L. Rev. 1315, 1317 (2005).

Many people involved in the administration of criminal justice are concerned about *Blakely*. "A single court decision has created a level of confusion and uncertainty that has never been experienced in the area of criminal sentencing." Minnesota Sentencing Guidelines Commission, "The Impact of *Blakely* v. *Washington* on Sentencing in Minnesota: Long Term Recommendations 19 (2004), http://www.msgc.state.mn.us/Data%20Reports/blakely_longterm.pdf. Minnesota estimates that its system generated 300 to 400 cases a year that are likely to be subject to *Blakely*. See *id.*, at 9. Although this would not create a "severe crisis" in Minnesota, see *ibid.*, it is still a large number of reversals. The impact is likely to be significantly greater in more populous jurisdictions, and those that rely more on enhancements.

Harmless error tempers *Blakely*'s impact, while preserving its integrity. The *Chapman* rule "save[s] the good in harmless-error practices while avoiding the bad, so far as possible." See 386 U. S., at 23. When a defendant's substantial rights are not harmed, the sentence should not be swept up in *Blakely*'s tidal wave. A finding of harmless error can be made by appellate courts, allowing courts to forego the useless and administratively costly ritual of resentencing when it is clear beyond a reasonable doubt that the sentence would be the same absent the *Blakely* error. *Blakely* will not be subverted by harmless error. The *Chapman* standard is designed to avoid that problem. See *id.*, at 22-23. *Blakely* error is measurable, and it does not threaten the structural integrity of the trial. See Part I, *supra*.

"Since its surprising arrival on June 24, 2004, *Blakely* has been likened to a legal earthquake, a forty-car pile up, a bombshell, and a bull in a china shop." Reitz, The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes, 105 Colum. L. Rev. 1082, 1086 (2005). Harmless error will make for a more just and less messy aftermath to *Blakely* while preserving the rule's basic purpose.

III. The full retroactivity rule of *Griffith* v. *Kentucky* should be limited to cases of actual prejudice.

As discussed in Part II, *supra*, harmless error is one way to mitigate the harshness of the full retroactivity rule of *Griffith* v. *Kentucky*, 479 U. S. 314 (1987). Modifying *Griffith* itself is another.[3]

3. This Court has previously considered retroactivity issues raised only by *amici*. See, *e.g.*, *Stovall* v. *Denno*, 388 U. S. 293, 294, n. 1 (1967); *Teague* v. *Lane*, 489 U. S. 288, 300 (1989) (plurality opinion).

A. Retroactivity.

Under the pre-1987 approach to retroactivity, this would be an easy case. Extensions of the right to jury trial were uniformly held not retroactive. See *DeStefano* v. *Woods*, 392 U. S. 631, 635 (1968) (*per curiam*); *Daniel* v. *Louisiana*, 420 U. S. 31 (1975) (*per curiam*); see also Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *Schriro* v. *Summerlin*, No. 03-526, pp. 15-18. Under the current approach to retroactivity, another branch of the *Apprendi* line of cases was held not retroactive on habeas corpus in *Schriro* v. *Summerlin*, 542 U. S. 348, 358 (2004).

For cases on direct review, however, nonretroactivity was abandoned in *Griffith* v. *Kentucky*. Together, *Griffith* and *Teague* adopted an approach to retroactivity first advanced by Justice Harlan in *Desist* v. *United States*, 394 U. S. 244 (1969) (dissenting opinion). The massive social cost of reversing judgments which were entered in trials that complied with all rules in effect at the time of the trial was justified on two grounds: integrity of the judicial process and equal treatment of similarly situated litigants.

The judicial integrity rationale comes from the source and nature of the judicial authority to make rules of constitutional law. The power vested by the Constitution is simply to decide cases and controversies, and establishing rules which are binding on state courts and sometimes contrary to statutes can only be legitimately done in the course of reaching a result required by the Constitution. See *Griffith*, 479 U. S., at 322-323; *Desist*, 394 U. S., at 258-259 (Harlan, J., dissenting); *Mackey* v. *United States*, 401 U. S. 667, 678 (1971) (Harlan, J., concurring in the judgment). If the Constitution required reversal in *Batson* v. *Kentucky*, 476 U. S. 79 (1986), then it necessarily required reversal in *Griffith*, because the cases were not distinguishable. See *Griffith*, *supra*, at 327.

A closely related reason for the *Griffith* rule was the perceived need to treat similarly situated defendants equally.

Under the prior retroactivity system, the creation of a new rule was something of a legal lottery. " '[O]ne chance beneficiary—the lucky individual whose case was chosen as the occasion for announcing the new principle—enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine.' " *Ibid.* (quoting *Hankerson* v. *North Carolina*, 432 U. S. 233, 247 (1977) (Powell, J. concurring in the judgment)).

The *Griffith* rule, however, comes with an enormous price tag. The cost of equal generosity to all appellant-defendants is equal harshness to all their victims. Under the pre-*Griffith* system, while the woman raped by Ernesto Miranda had to endure the ordeal of testifying a second time, see G. Stuart, *Miranda*: The Story of America's Right to Remain Silent 93 (2004), hundreds and possibly thousands of other women did not. See *Johnson* v. *New Jersey*, 384 U. S. 719, 732 (1966) (nonretroactive to cases tried before the *Miranda* decision).

The proper scope of retroactivity is limited by the scope of the necessity for the rule. "[W]hen another *similarly situated* defendant comes before us, we must grant the same relief or give a *principled reason* for acting differently." *Desist*, 394 U. S., at 258 (opinion of Harlan, J.) (emphasis added). When the defendant is similarly situated and there is no principled reason for a different result, then the drastic step of reversing a judgment obtained in accordance with then-prevailing constitutional norms is a necessary evil. When these criteria are not met and the defendant has been fairly convicted and sentenced, it is just plain evil.

Justice Harlan found a principled reason for different treatment in the distinction between appeals and collateral attacks on final judgments. See *Mackey*, 401 U. S., at 688-689 (opinion concurring in the judgment). In *Teague*, 489 U. S., at 310, a plurality of this Court agreed, and the rule was subsequently endorsed by a majority in *Penry* v. *Lynaugh*, 492 U. S. 302, 313-314 (1989). The reason for this distinction goes primarily to the judicial integrity rationale of *Griffith*. Appeals

and collateral attacks are different proceedings with different purposes. See *Mackey*, *supra*, at 682-683. From the standpoint of the defendant, the date of finality is somewhat fortuitous. See *Shea* v. *Louisiana*, 470 U. S. 51, 63-64 (1985) (White, J., dissenting).

The present case raises a different ground for distinguishing among the various defendants whose cases are tried before the announcement of a new rule but appealed afterward. Some defendants have at least a plausible claim to have been actually injured by the previously allowed but now forbidden practice, and some do not.

Apprendi v. *New Jersey*, 530 U. S. 466 (2000) itself provides the clearest example in the line of a case with a plausible allegation of actual harm. The allegation of racial bias for the hate crime enhancement was specifically contested. *Id.*, at 470-471. Indeed, it was the only major dispute in the case, because Apprendi had pleaded guilty to the underlying offenses as part of a plea bargain. See *id.*, at 469-470. The principal evidence against him was his statement, made after three hours of interrogation and later retracted. See *id.*, at 469. The finding was made by the trial judge under a preponderance standard, based on his assessment of the credibility of the witnesses. See *id.*, at 471. On these facts, one cannot say with any degree of certainty that a jury applying the reasonable doubt standard would necessarily have come to the same result. A jury trial might or might not have been more accurate. See *Ring* v. *Arizona*, 536 U. S. 584, 607 (2002); *Summerlin*, 542 U. S., at 357-358. It is sufficient for this purpose that there is a reasonable probability that the result might have been different.

The present case, in contrast, provides the clearest example in the *Apprendi* line of a pure, undeserved windfall for a guilty criminal if the judgment is reversed. The trial judge proceeded in a manner considered perfectly legal under the case law in effect at the time of the trial. If the case were retried and the question of what kind of weapon was used submitted to a jury,

nothing but patent jury nullification could prevent an affirmative finding that it was a gun.

Recuenco is not similarly situated with Apprendi. There is a principled reason for treating the cases differently. Apprendi was denied a jury trial and the reasonable doubt standard on the principal contested issue of his case. Recuenco seeks the benefit of a windfall due to fortuitous timing of his trial and appeal, on an issue that was completely uncontested and would almost certainly have been decided against him by the jury in a post-*Blakely* trial. See App. to Pet. for Cert. 18a.

B. Prejudice.

Violation of a constitutional norm does not invariably require reversal of a criminal conviction. As discussed in parts I and II, *supra*, most constitutional rules are subject to harmless error analysis. On direct appeal, harmlessness is judged by the standard of *Chapman* v. *California*, 386 U. S. 18, 24 (1967), while the more drastic remedy of collateral attack on habeas corpus is subject to the higher hurdle of *Brecht* v. *Abrahamson*, 507 U. S. 619, 623 (1993).

For one type of claim, though, this Court has gone beyond harmless error analysis and required an affirmative showing of prejudice as an element of the defendant's case for reversal. For ineffective assistance of counsel claims, it is not sufficient to show a violation of the Sixth Amendment guarantee. In addition, "the defendant must show that the deficient performance prejudiced the defense." *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984).

One of the reasons for this unusual requirement is the inability of the prosecution and the trial court to protect the judgment from ineffective assistance claims. "The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." *Id.*, at 693. Most claims on appeal and habeas corpus are claims that the prosecution, the trial judge, or occasionally a

juror or court employee took some action that violated existing rules of law. Ineffective assistance is an exception, and the helplessness of the state to prevent it justifies the requirement that the defendant affirmatively show prejudice.

So it is with new rules created after the trial. A trial judge cannot possibly anticipate every change in legal doctrine that might come between the trial and the date of finality. A judge who rules in accordance with current law has done his or her job correctly, even if this ruling is later found to be "error" in the technical sense. See *Johnson* v. *United States*, 520 U. S. 461, 467 (1997). Lack of prescience is not, however, "error" in the ordinary sense, and violation of an existing rule is fundamentally different from violation of a rule created *ex post facto*. Cf. U. S. Const., Art. I, §§ 9, cl. 3, 10, cl. 1.

Requiring appellants who seek the benefit of new rules to make a *Strickland*-like showing of prejudice would further ameliorate the different treatment of similarly situated defendants that *Griffith* sought to reduce. At present, those defendants whose attorneys anticipated the change receive the same review as in cases tried after creation of the rule. Those defendants whose attorneys simply concentrated on making the best defense available under current law typically receive only a "plain error" review. See, *e.g.*, *Johnson*, 520 U. S., at 465-466.[4]

Under the federal "plain error" standard, "overwhelming" evidence of the omitted element and its "essentially uncontroverted" status means that failure to submit the element to the jury is not "plain error." *Johnson*, *supra*, at 470. Under *Griffith* and *Johnson* as they presently stand, some clearly guilty defendants would get the windfall of a reversal while some would not, based on whether their lawyers made objec-

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4. This varies by jurisdiction. The intermediate appellate court in the present case stated that in Washington, "a 'manifest' constitutional error . . . may be reviewed for the first time on appeal." App. to Pet. for Cert. 18a.

tions at trial which the trial judge could not have legally sustained. A prejudice requirement for all appellants seeking retroactive application of new rules would make the availability of reversal depend more on the merits of the case and less on the prescience of the lawyer.

The addition of a prejudice requirement would have no significant impact on the ability of this Court to make new rules. Prejudice, unlike retroactivity, need not be decided before the underlying question. Compare *Strickland*, 466 U. S., at 697, with *Caspari* v. *Bohlen*, 510 U. S. 383, 389 (1994). Like harmless error, prejudice can be left for decision on remand. Cf. *Ring*, 536 U. S., at 609, n. 7.

In summary, the ill effects of the *Griffith* rule can be mitigated, without impairing its purposes, by requiring an affirmative showing of prejudice from any appellant seeking the benefit of a new rule created after the trial. *Amicus* respectfully submits that the Court should adopt such a requirement.

CONCLUSION

The decision of the Supreme Court of Washington should be reversed.

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Respectfully submitted,

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